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No. 86-1330

In the Supreme Court of the United States

OCTOBER TERM, 1986

KATRINA MAXTONE-GRAHAM, PETITIONER

v.

JAMES T. BURTCHAELL, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC. AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC.

The American Society of Journalists and Authors, Inc. (ASJA) respectfully moves for leave to file the attached brief as amicus curiae in this case in support of the petitioner. The attorney for the petitioner has consented to the filing of this brief. The consent of the attorney for the respondents was requested but refused.

The ASJA is a private, nonprofit organization dedicated to encouraging high standards in nonfiction writing. Its membership consists of over 700 independent free-lance nonfiction writers throughout the United States. The members of the ASJA depend upon the copyright laws to protect their economic and artistic in-

terests in their original work from exploitation by subsequent users. Without these statutory safeguards, a writer's motivation to produce creative and original work would be greatly diminished. Thus, the ASJA and its members have a direct interest in the correct interpretation and vigilant enforcement of the copyright laws.

The ASJA is concerned that the court of appeals' decision in this case, which erroneously broadens the scope of the fair use defense, deprives copyright holders of valuable statutory protections, with grave implications for those who earn a living by writing. The ASJA seeks leave to file an amicus curiae brief to discuss the impact of this decision and to stress the importance of having the scope of the fair use defense clarified by this Court.

Respectfully submitted,

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TABLE OF AUTHORITIES

Cases:

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BRIEF FOR THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Society of Journalists and Authors, Inc. (ASJA) is a private, nonprofit, literary and educational organization whose membership consists of more than 700 independent free-lance writers of magazine articles, books and other nonfiction works. The ASJA is dedicated to improving the professional standards of nonfiction writing in the United States. To further this goal, the ASJA has developed a code of professional and ethical guidelines governing editor-writer relations and has organized numerous seminars and educational workshops.

For those who earn a living by writing, the economic and artistic protection of an original work is an absolute necessity. The Copyright Act of 1976 provides writers with the economic incentive to create and disseminate original works by granting them control over the publication and republication of such works. The members of the ASJA thus depend upon the copyright laws to protect their creative efforts from unfair use by others.

The ASJA and its members are greatly concerned by the court of appeals' decision in this case. That decision substantially broadens the scope of the fair use defense in copyright infringement cases by sanctioning as a "fair use" the quotation and misquotation for commercial purposes of over 7,000 words from the heart of a copyrighted work. This unprecedented construction of the fair use defense limits the protections granted by the copyright laws and, as a result, will diminish the incentive of authors to create original material. Ultimately, not only writers but the general public will suffer the adverse consequences of this decision.

SUMMARY OF ARGUMENT

The principal purpose of the Copyright Act of 1976 is to protect the economic interests of authors in order to provide them with an incentive to create original works for the benefit of the public. Writers depend upon the copyright laws to prevent unfair use of their original work. Thus, any unwarranted broadening of the scope of the fair use defense in copyright infringement cases improperly increases the risk of exploitation and diminishes the incentive to engage in creative activity, all to the detriment of the public.

The court of appeals held in this case that, as a matter of law, the verbatim quotation and misquotation of over 7,000 words from the heart of a copyrighted work for a profit-making purpose constituted a fair use. That

ruling cannot be squared with this Court's decisions in *Harper & Row* or *Sony Corp.* or with the purposes of the copyright laws. Rather, the decision below represents an unprecedented weakening of copyright protection. Given the Second Circuit's acknowledged leadership in the development of copyright law, and the status of New York City as the center of the publishing industry, review of this disturbing decision is essential.

ARGUMENT

I. THE COURT OF APPEALS FAILED TO APPLY THE PRESUMPTIONS ESTABLISHED BY THIS COURT THAT COMMERCIAL INFRINGEMENTS HAVE AN IMPROPER PURPOSE AND CHARACTER AND HARM THE MARKET FOR THE COPYRIGHTED WORK.

As the Petition demonstrates, the court of appeals erred in its analysis of the fair use factors set forth in Section 107 of the Copyright Act, 17 U.S.C. § 107. In examining the first factor of Section 107—the purpose and character of the use—the court failed to apply the presumption, recognized by this Court in *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), that commercial infringements of copyrighted material have an improper purpose and character. Instead, the Second Circuit created a subjective test that requires an assessment of the infringing work to determine whether the content is primarily "commercial" or "educational." Under this new test, infringers would be able to benefit from the fair use defense merely by marketing their commercial exploitations under the guise of "educational" works, which might conceivably describe any work of nonfiction intended to inform and enlighten the public.

Similarly, in its analysis of the fourth factor of Section 107—the effect of the use upon the potential market

for or value of the copyrighted work—the court of appeals failed to apply this Court's prior holding in *Sony Corp.* that harm may be presumed when an infringing work has a commercial purpose. 464 U.S. at 451. Instead, the court of appeals erroneously placed the burden of proving harm on Maxtone-Graham.

The court of appeals' blatant refusal to apply the clear presumptions mandated by this Court substantially weakens the protections afforded by the Copyright Act. These rulings will have a severe adverse impact on professional writers, both within the Second Circuit, where most of the nation's publishing industry is located, and in other courts, which have traditionally looked to the Second Circuit for guidance in interpreting the copyright laws. For this reason, the ASJA strongly urges the Court to grant the petition for certiorari in order to correct the Second Circuit's misinterpretation of the fair use defense. *Sony Corp.* and *Harper & Row* mean very little if the Second Circuit's construction of those cases is allowed to stand.

II. VERBATIM COPYING OF MORE THAN 7,000 WORDS FROM A COPYRIGHTED WORK FOR A COMMERCIAL PURPOSE COUPLED WITH MISQUOTATIONS AND MISREPRESENTATIONS IS NOT A FAIR USE.

The ASJA is particularly troubled by the Second Circuit's egregious construction of the third fair use factor identified in Section 107 of the Copyright Act—the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The court of appeals' holding that Burtchaell's verbatim copying of over *7,000 words* from *Pregnant by Mistake* constituted a fair use essentially reads this provision out of the statute.

While it is difficult to place a quantitative limit on the number of words that may be appropriated and still fall within the scope of the fair use defense, the word-

for-word copying of over 7,000 words (which translates approximately into the length of the certiorari petition in this case) offends the ethical and professional sensibilities of the ASJA membership and makes a mockery of the Copyright Act protections. Burtchaell himself suggested that there is a recognized limit on quotations from copyrighted works, which he estimated to be 500 to 1,000 words. Petition at 4. Yet the volume of material Burtchaell appropriated from *Pregnant by Mistake* is many times that amount. Moreover, nearly one-fifth of the lead essay in *Rachel Weeping* consists of nothing more than verbatim quotations from Maxtone-Graham's copyrighted work. The appropriation is especially offensive in this case because Burtchaell was specifically denied permission to use Maxtone-Graham's material.

In addition to the sheer volume of material copied, Burtchaell appropriated "the heart of" *Pregnant by Mistake*. See *Harper & Row*, 471 U.S. at 565. Burtchaell used the most expressive and critical passages from 16 out of the 17 chapters in Maxtone-Graham's book. Similar to the facts in *Harper & Row*, Burtchaell structured *Rachel Weeping* around verbatim quotations from *Pregnant by Mistake*, which served as the "dramatic focal points" for his book. 471 U.S. at 566. As the Petition points out, other "courts have had little trouble finding that far lesser copyings were both quantitatively and qualitatively substantial in denying fair use defenses." Petition at 23.

The ASJA and its members are seriously concerned about the consequences of a decision that considers the verbatim quotation of more than 7,000 words, which constitute the heart of an original work, to be a fair use. From a purely economic standpoint, words are a writer's source of income. The copyright laws were created to ensure a fair return for an author's creative labor. The ultimate aim of this economic protection is to stimulate artistic creativity for the benefit of the general public.

See *Sony Corp.*, 464 U.S. at 432. Here, the copyright laws served the purpose of inducing the creation of an important new work. Ultimately, however, Maxtone-Graham was denied her fair return in this case. Her incentive to undertake creative endeavors in the future, as well as the incentive of all authors, may be dampened by the Second Circuit's willingness to sanction Burtchaell's enormous appropriation as a matter of law.

Another troubling feature of the decision below is the court of appeals' cavalier treatment of the acknowledged fact that *Rachel Weeping* contained numerous distortions of and misquotations from *Pregnant by Mistake*. The court held, again as a matter of law, that Burtchaell's distortions and misquotations were not deliberate. Even assuming that the court of appeals could properly have made that factual finding from the cold record, the ASJA believes that the subjective intent of the infringer should not be determinative. Instead, the courts below should have considered the totality of the circumstances in deciding whether the copyrighted work had been used unfairly. See *Sony Corp.*, 464 U.S. at 448 (fair use defense is an equitable rule of reason).

Even if not deliberate, a subsequent user's misquotations and misrepresentations are potentially damaging to the reputation of the original author of a work, can destroy the relationship between the author and his or her interviewees, and can diminish the author's ability to cultivate new sources. As Maxtone-Graham described in the preface to her book, the interviewing and editing process involved in *Pregnant by Mistake* was a painstaking and arduous task. It is difficult to see how Burtchaell's misquotation and distortion of the very material that Maxtone-Graham took such pains to report accurately could be considered a "fair" use of the copyrighted work.

In sum, the ASJA believes that the Second Circuit's decision in this case is among the most damaging attacks

on the protections granted by the copyright laws in recent years. We therefore urge the Court to accept the Petition in order to clarify the boundaries of the fair use defense —a defense that is almost routinely raised in suits alleging copyright infringement. The Second Circuit's decision broadens the scope of the fair use defense in a manner that is flatly inconsistent with this Court's opinions in *Sony Corp.* and *Harper & Row* and the rule in other circuits. If allowed to stand, the decision below will encourage the uncompensated and unfair appropriation of copyrighted works, to the deteriment of not only ASJA members and all professional writers but, ultimately, the general public.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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